Level(3)
COMMUNICATIONS

EX PARTE

March 10, 2006

VIA ELECTRONIC FILING
Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Verizon Telephone Companies Petition for Forbearance, WC Docket No. 04-440

Dear Ms. Dortch:

On March 9, 2006, Adam Kupetsky, Regulatory Counsel for Level 3 Communications, LLC ("Level 3"), and John Nakahata, of Harris, Wiltshire & Grannis, LLP, representing Level 3, had separate meetings regarding the proceeding referenced above with: (a) Ian Dillner, Acting Legal Advisor to Chairman Martin; (b) Jessica Rosenworcel, Legal Advisor to Commissioner Copps; (c) Scott Bergmann, Legal Advisor to Commissioner Adelstein; and (d) Aaron Goldberger, Legal Advisor to Commissioner Tate, and Dana Shaffer, Acting Legal Advisor to Commissioner Tate (via telephone). During the meetings, Level 3 made the points set forth below.

- **Procedural Issues.** In the first instance, the Commission should reject Verizon's petition on procedural grounds. By seeking broad relief without defining the specific relief sought or the services for which it seeks relief, and without providing the specific evidence required to show that forbearance is justified, Verizon is abusing the Section 10 Forbearance mechanism. It was not until February 7, 2006 – six weeks prior to the statutory deadline – that Verizon even specified the services for which it is seeking forbearance. Verizon has never specified the rules and statutory provisions from which it seeks forbearance with any specificity. Verizon has stated only that it seeks relief from the "*Computer Inquiry* rules" and from "Title II." But these references are so general and vague as to be meaningless. The *Computer Inquiry* rules, for example, include the separation of CPE from network services. Is Verizon seeking the end of Part 68 with respect to these services or the ability to avoid open interfaces for CPE that connects to the enumerated services? From which parts of the *Computer Inquiry* rules is Verizon seeking forbearance? Its reference to "Title II" regulation is equally unhelpful and clearly overbroad. Is Verizon really seeking to be able to be free of Section 222's requirements of confidentiality of carrier and customer proprietary network information for these services it has now enumerated? Is Verizon seeking to be freed from Section 229's provisions with respect to CALEA compliance? Is Verizon seeking the ability to reclassify the enumerated services as non-common carrier services and then to be able to withdraw them without the review required even for non-dominant carriers under Section 214? Because Verizon defined the services for which it has requested relief only weeks before the Commission must act on the petition, and has yet to specify the specific scope of the requested relief, Verizon puts the Commission and opposing parties in the position of analyzing an entirely new request for relief with little time to do so. And by failing to provide specific evidence regarding why forbearance is justified in each market nationwide, Verizon further makes it impossible to conduct such an analysis at all. Verizon, of course, could have filed a petition that more clearly specified the services to be covered, the relief to be sought, and backed up by actual evidence with real market analysis. It simply chose not to do so. This type of gamesmanship should not be rewarded.

- **Verizon's Petition would result in discrimination.** Because it has obtained (or can obtain) pricing flexibility, Verizon already has an opportunity to enter into contractual arrangements and, in areas where it has received Phase II flexibility, avoid pricing its services under price caps. By this petition, Verizon seeks the ability not just to price freely (which it already has in all Phase II areas) but to discriminate unreasonably and raise prices, unilaterally withdraw service offerings without regulatory scrutiny and otherwise avoid common carrier regulation. For example, if this petition were granted it could provide low pricing for itself, high pricing for competitors and raise prices to its customers to the level just below which would allow competitors economically to build to the customer. This is greater relief than that currently afforded to long distance companies, even though the long distance market has been robustly competitive for decades and the special access market remains monopoly controlled in many locations. Moreover, the potential for discrimination is not cured by simply retaining the applicability of Sections 201 and 202 for those services that Verizon chooses to offer as common carriage. Verizon could simply choose to offer a service only on a private carriage basis, and evade Sections 201 and 202 entirely.

- **Verizon's Petition will result in deregulation in areas without competition.** Level 3 and others rely on high capacity (including OC-n and Ethernet level capacity) special access bought from Verizon to provide a range of end-to-end services to its customers, particularly where there are no other economically feasible alternatives. Level 3 does not distinguish between so-called "TDM" or "packet" based special access services. Where economically feasible, Level 3 looks for alternative providers of these services or seeks to self-provide them. These alternative providers or the ability to self-provide may be available in certain markets. In many cases, however, Verizon is the only option for obtaining the high capacity (including OC-n) channel terminations necessary to serve Level 3's customers. Because Verizon does not provide an analysis of competitive alternatives in those markets where Verizon seeks relief, neither Level 3 nor the Commission can accurately determine whether Verizon has met the forbearance criteria.

- **Verizon fails to conduct any competitive analysis of relevant product and geographic markets and the alternatives available in those markets.** Granting Verizon's petition on the basis put forward by Verizon would severely undermine continued availability of special access services that are essential to business users and Verizon's competitors seeking to serve those business users. Because Verizon does not attempt to justify its requested relief on a market-by-market basis and provides only general nationwide market data that make it impossible to analyze Verizon's market power in selected special access markets, a Commission decision to grant the petition would set a precedent that any special access service can be deregulated with minimal justification and competitive analysis and with data from markets other than those affected by the requested relief.

  It is particularly notable that in its recent *Verizon-MCI Order*, the FCC recognized that special access services were comprised of three different product markets – the entrance facility, local transport and the "last mile."[1] The FCC further acknowledged that the relevant geographic market for special access is a particular customer location, although it then aggregated as similarly situated all customers within the MSA.[2] While Level 3 believes that MSA aggregation was inappropriate because it aggregated together customers with disparate competitive choices, Verizon's petition is in any event woefully deficient because it fails to engage in *any* analysis according to the Commission's just-recently recognized product and geographic markets for special access services. Any Commission decision granting Verizon's petition without such evidence would be patently arbitrary and capricious because the Commission would lack any record basis to support a finding of competition (and therefore compliance with Sections 10(a)(1), (2), or (3)) in any of its acknowledged relevant product and geographic markets.

- **Verizon cannot claim to face substantial competition in areas where it has not even sought pricing flexibility, and its Petition therefore is inconsistent with the Commission's special access pricing flexibility rules.** In seeking the most drastic and competition-impeding relief (elimination of Title II obligations) without conducting a market-by-market analysis, Verizon is circumventing established Commission mechanisms for granting ILEC relief where appropriate. For example, Verizon already has taken advantage of the Commission's pricing flexibility rules to obtain substantial relief from the Commission's pricing and tariffing rules. Although the Commission's pricing flexibility rules are flawed in a number of ways to the detriment of Verizon's special access customers (including competitors that must purchase Verizon special access inputs in order to offer their own services),[3] the fact

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[1] Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control, WC Docket No. 05-75, Memorandum Opinion and Order, FCC 05-184 (rel. November 17, 2005) (*Verizon-MCI Order*), at ¶¶ 25-27.
[2] *Id.* at ¶¶ 28-29.
[3] Indeed, effective reform of the Commission's special access regime very well could alleviate many of Level 3's concerns with the relief sought by Verizon. For example, a special access regime that encourages CLEC entry into the special access market by limiting ILECs' ability to enter into anticompetitive non-cost-based discount agreements would stimulate special access competition and potentially provide Verizon with greater justification to seek deregulation.

remains that Verizon currently has the ability to provide information on an MSA by MSA basis and obtain pricing flexibility in markets that meet the Commission's criteria. Although Verizon's petition seeks more relief than that granted under the Commission's pricing flexibility rules, it is striking that in seeking greater (and for competitors, terminal) relief, Verizon has proffered even less evidence of competition or the likelihood of competition than even the insufficient amount of evidence required under the pricing flexibility rules. Moreover, it seeks such relief not just where it qualifies for pricing flexibility, but also where it has not qualified for pricing flexibility.

The Commission's *Fast Packet Order* further highlights the stunning overbreadth of Verizon's Petition.[4] In that Order, the Commission waived its rules to permit Verizon to offer certain fast packet services under Phase I pricing flexibility in areas where it had already qualified for Phase I or Phase II pricing flexibility with respect to its other special access services. The Commission, however, expressly declined to waive its rules with respect to Phase II pricing flexibility, which would permit, *inter alia*, pricing outside of price cap regulation, the Commission's Part 69 rate structure rules, and tariff filing on one day's notice. The Commission stated:

> "We are persuaded, however, that a competitive showing *is necessary* for Phase II relief. We have previously noted that decisions to grant or withhold pricing flexibility must weigh relative costs and benefits. Any competitive harms resulting from our grant of Phase I relief do not outweigh the potential benefits of promoting competition through this relief. The costs are relatively small because . . . safeguards prevent unreasonable rate increases. A price cap LEC that receives Phase II relief, however, may offer qualifying services free from the Commission's Part 69 rate structure and Part 61 price cap rules. Although it must continue to make the services generally available through tariffs, its rates are not regulated under Parts 61 or 69. *Because we rely on the Phase II triggers to demonstrate that competition for the services at issue within the MSA is sufficient to preclude the incumbent from exploiting any individual market power over a sustained period, it would not be in the public interest to waive these triggers without requiring a separate competitive showing for Verizon's advanced services.*"[5]

Notwithstanding this conclusion by the Commission less than five months ago, Verizon's petition now seeks to achieve what the Commission refused to grant last November – and even more. If granted, the current petition would eliminate the applicability of Parts 61 and 69 (in addition to the rest of the Commission's common carrier rules) without even the minimal competitive showing required under the pricing flexibility rules. There is no way that the Commission can, consistent with

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[4] Petition for Waiver of Pricing Flexibility Rules for Fast Packet Services, WC Docket No. 04-246, Memorandum Opinion and Order, FCC 05-171 (rel. October 14, 2005) at ¶ 18 (*emphasis added*).
[5] *Id.* at ¶ 18.

any concept of reasoned decisionmaking, grant Verizon's current petition in light of the *Fast-Packet Order.*

- **The *Wireline Broadband Internet Access Order* does not support grant of the Petition.** The Commission's *Wireline Broadband Internet Access Order*[6] does not support and in fact undermines Verizon's petition. In that Order, the Commission eliminated the Computer Inquiry II and III rules relating to the separate offering of underlying transmission services intertwined with the common carrier's Internet Access Services (*i.e.* 47 C.F.R. 64.702(c)(1)) based on the Commission's prediction that competition by cable modem providers would allow residential consumers to reach the ISP of their choice. That is not the case here, where, as discussed above, Verizon has not even attempted to show that competition is or is likely to provide enterprise customers with adequate alternatives for reaching broadband services in the absence of the bottleneck special access services that Verizon wants to be able to offer free of regulations. Moreover, as others have shown, the Commission specifically rejected Verizon's request for the same relief in the Broadband Internet Access Order.

- **The *TRO* does not support grant of the Petition.** Nor do the Commission's findings in the *Triennial Review Order* that OC-n level loops are not impaired in any market justify finding that sufficient competition for special access services exists in every market. As an initial matter, to justify forbearance, Verizon is required to show actual competition, or at a minimum that in each relevant product and geographic market potential competition can become actual competition so quickly as to discipline any Verizon attempt to increase prices. Verizon has not even attempted to make such a showing. Moreover, in determining that OC-n level loops are not impaired, the Commission relied heavily on CLECs' ability to access and use dark fiber UNEs to self-provide OC-n level services.[7] In the *Triennial Review Remand Order*, however, the Commission found CLECs unimpaired without access to dark fiber UNE loops and eliminated such access.[8] The Commission also relied on the economic incentives for CLECs to provision services for OC-n level capacity based on the higher revenues that such carriers can expect for providing such services.[9] In the interim, however, both the FCC and the Department of Justice found that competitors often cannot economically justify provisioning facilities to buildings to which Verizon controls bottleneck access.[10] Indeed, between 2002 and 2005, prices

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[6] Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02-33, Report and Order, FCC 05-150 (rel. September 23, 2005) ("*Wireline Broadband Internet Access Order*").

[7] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Report and Order and Order on Remand, FCC 04-290 (rel. August 21, 2003) ("*Triennial Review Order*" or "*TRO*") at ¶ 318. The Commission also based its decision on its finding that CLECs had not sought OC-n level unbundled network elements. Id. ¶ 319.

[8] Unbundled Access to Network Elements, WC Docket No. 04-313 (rel. February 4, 2005) ("*Triennial Review Remand Order*" or "*TRRO*") at ¶ 182.

[9] *TRO* at ¶ 316.

[10] *Verizon-MCI Order* at ¶ 39; *United States v. Verizon Communications Inc.*, Civil Action No. 1:05CV02103, Complaint (D.D.C. filed Oct. 27, 2005) at ¶¶ 27, 29.

for services for which Verizon's OC-n special access services are an input dropped substantially, reducing the ability of Verizon's special access customers to economically justify building alternative facilities: for IPVPN OC12 prices dropped more than 87%, while IPVPN DS1 prices dropped approximately 65% and OC12 private line pricing dropped almost 55%. These declining revenues for the products sold by Verizon's wholesale customers make it very difficult for customer-competitors to self-provision the special access inputs and for CLECs to offer competing local special access services. Although it is not impossible to do so in certain markets, the Commission may not find that it is generally economically feasible in all or even most markets. Finally, the *TRO* and the *TRRO* focused exclusively on whether CLECs were impaired without access to UNEs and explicitly relied on the continued availability of special access services where it found UNEs to be unimpaired.[11] Special access services are the access method of last resort and should not be subject to discontinuance, unreasonable rates, terms and conditions or detariffing without a very specific analysis regarding whether continued regulation is necessary because of a lack of competitive alternatives. Verizon has provided no such analysis, and thus the record lacks any basis for forbearance from these Title II regulations.

- **Verizon has not demonstrated that non-dominant status is justified.** Level 3 also disagrees with granting nondominant treatment that would allow Verizon to offer services off-tariff. While the Commission may be tempted to grant such limited relief, Verizon has provided no evidence that justifies a finding of nondominance in every market for special access services (which the Commission has consistently recognized are point-to-point services defined within a local market) provided by Verizon. In the *Qwest Omaha Order*, the Commission demonstrated that non-dominance requires an evaluation of the competitive conditions in the actual product and geographic markets, the evidence for which is wholly absent from the record.[12] Accordingly, allowing Verizon to provide off-tariff special access services based on the paltry showing made by Verizon would countenance Verizon's abuse of the forbearance process and establish the legally unsupportable principle that the Commission must deregulate a bottleneck service in one geographic market based on a minimal showing of competition in an entirely different geographic market. Moreover, the Commission lacks safeguards that would ensure compliance with Title II if Verizon no longer had to file tariffs for its special access services.[13] Absent

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[11] *TRRO* at ¶¶ 64-65.

[12] Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, WC Docket No. 04-223, Memorandum Opinion and Order, FCC 05-170 (rel. December 2, 2005) at ¶¶ 18-50.

[13] By comparison, the FCC requires nondominant interexchange carriers to make available to any member of the public, in at least one location, and on its website, "its current rates, terms and conditions for all of its international and interstate domestic, interexchange services." 47 C.F.R. § 42.10. Moreover, the Commission has made clear that "all information must be publicly disclosed, including information on services offered through individually negotiated contracts." *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Impelemntation of Section 254(g) of the Communications Act of 1934, as amended*, 15 FCC Rcd 22321, 22329 (2000) at ¶ 23. These requirements apply to nondominant

tariffs, for example, Verizon could enter into arrangements or jointly bid contracts with itself or a favored third party without having to provide any notice or disclose any detail of such arrangements to competitors. In the absence of Section 272 separation requirements (or safeguards to replace them), moreover, there would be no separate entity with which to contract.

For the reasons set forth above, the Commission should deny Verizon's petition and invite the company to apply for relief on a market-by-market basis.

Pursuant to the Commission's rules, one copy of this memorandum is being filed electronically in the docket referenced above for inclusion in the public record. Please do not hesitate to contact me at 918 547 2764 if you have any questions.

Respectfully submitted,

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cc (via electronic mail):

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interexchange carriers, which face much greater competition than Verizon could claim exists in the special access markets (even if it attempted to make such a showing).